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IN THE

# Supreme Court of the United States

October Term, 1947

No. .....

GLENS FALLS INDEMNITY COMPANY, a corporation,

*Petitioner,*

*vs.*

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

*To the Honorable the Supreme Court of the United States:*

Your Petitioner respectfully shows:

### I.

### Summary Statement of Matter Involved.

This is an action at law brought in the District Court of the United States, for the Southern District of California, Central Division, by Basich Brothers Construction Company, a corporation, Respondent herein, against

Glens Falls Indemnity Company, a corporation, Petitioner herein, on a contract of suretyship wherein Petitioner was named as Surety, Respondent as Obligee, and Duque & Frazzini (subcontractor) as Principal, to recover on said bond for the breach of the subcontract by the Principal. The jurisdiction of the District Court rested upon the diversity of citizenship of the parties and the amount claimed ($78,503.71).

The trial was by the Court, Honorable Leon R. Yankwich, Judge Presiding. Findings of fact and conclusions of law were made by the Court and judgment was entered in the District Court on March 10, 1947 in favor of Plaintiff, for $79,582.91 plus interest prior to judgment in the sum of $8,557.49 and costs of suit [R. 212-214].

The case was one properly appealable to the Circuit Court of Appeals. A Supersedeas Bond was approved by the Court and filed by Glens Falls Indemnity Company and an appeal taken from the said judgment to the Circuit Court of Appeals for the Ninth Circuit. That Court took jurisdiction and affirmed the judgment of the District Court. The opinion was filed and judgment of said Court was entered on the 3rd day of February, 1948 [R. 886-894]. This decision has been reported in 165 F. (2d) 649. A petition for rehearing was filed within the time allowed and denied by the Court on March 3, 1948 [R. 895].

The case was tried and the appeal to the Circuit Court of Appeals was taken upon issues framed around the terms of the surety bond. By the terms thereof recovery thereon by the obligee from the surety was conditioned upon full performance by the obligee of certain express conditions precedent. The conditions precedent

which are important from the standpoint of this appeal are as follows [R. 34]:

(1) In the event of any default upon the part of the subcontractor in the performance of the subcontract, the obligee, Respondent, shall promptly deliver written notice thereof to the surety at its Los Angeles Office and in any event within twenty (20) days after the obligee or his representative shall learn of such default.

(2) The obligee shall faithfully perform all of the terms, covenants and conditions of the subcontract on its part to be performed.

(3) The obligee shall retain the last payment payable by the terms of the subcontract, and all reserves and deferred payments retainable by the obligee under the terms of the subcontract until the complete performance by the subcontractor of the subcontract.

All of the points of this appeal save two stem from these conditions precedent insofar as the facts are concerned. The exceptions are the legal points that under the fundamental principles of law, and particularly the law of the State of California, (a) a judgment may not exceed the amount demanded in the complaint and (b) where the amount claimed in the complaint is unliquidated and uncertain, interest may be assessed only from the date of entry of judgment.

A consideration of the provisions of the subcontract and the facts concerning the performance of the subcontract are important as they relate to the conditions precedent of the bond.

The subcontract had as its general objective the production of certain materials consisting of sand and gravel and provided for certain amounts of such materials to be produced in a specified number of days. It further specified the nature and capacity of certain plant and equipment which the subcontractor would be required to bring upon the job.

The subcontract provided that work should commence on February 19, 1945. The production of materials called for in the subcontract did not commence until on or about the 25th of February, and the specified plant and equipment was not moved onto the job and the subcontractor did not maintain sufficient force or equipment to produce the materials required in the contract. These facts were alleged in the complaint and proved by the evidence. The question arises as to whether or not these facts show such a substantial breach of contract as to constitute a default concerning which Respondent, obligee, was obliged to give notice or be deprived of his right to recover against Petitioner, surety, and the companion question as to whether or not such notice as required in the bond was actually given.

Respondent made payments on behalf of the subcontractor prior to the time that the subcontractor was credited with earnings and then credited the subcontractor's earnings as they became due against all of such payments or advances. This gives rise to the following question: Has the Respondent made payments to the subcontractor which should have been retained by the Respondent in order to comply with the conditions precedent set forth as numbers 2 and 3 above?

## II.

## Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment under Section 240 of the Judicial Code of the United States (28 U. S. C. A., Section 347).

The jurisdiction of the United States District Court rested on the diversity of citizenship of the parties and on the fact that the amount in controversy was in excess of $3,000 (28 U. S. C. A., Section 41).

The Circuit Court of Appeals had jurisdiction to review the judgment rendered by said District Court under 28 U. S. C. A., Section 225.

The opinion of the Circuit Court of Appeals [R. 886-893) was filed February 3, 1948 and is reported in 165 Fed. Rep. (2d) 649.

The judgment of the Circuit Court of Appeals was filed and entered February 3, 1948 [R. 894].

A timely petition for rehearing was filed by Petitioner on March 1, 1948 and was denied on March 3, 1948 [R. 895].

## III.

## Reasons Relied on for Allowance of the Writ.

The power of this Court to grant a Writ of Certiorari is invoked upon the grounds set forth in Rule 38, Subdivision 5(b) of this Court, in that the Circuit Court of Appeals for the Ninth Circuit "has decided an important question of local law in a way probably in conflict with applicable local decisions":

1. The Circuit Court of Appeals has rendered judgment based on findings of fact which are wholly unsupported by the evidence.

"We are well aware of the rule that, where there is any substantial evidence to support a finding, an appellate court, whatever it may feel as to the weight of the evidence, is without power to disturb the challenged finding, but that salutary rule has no application when the finding in question is totally unsupported by the evidence, and when the evidence, read as a whole is directly contrary to the finding. That is the situation here presented."

*Pacific Palisades Ass'n v. Menninger,* 219 Cal. 257, 26 P. (2d) 303.

2. The Circuit Court of Appeals has rendered judgment in excess of the amount demanded in the complaint.

"Respondent had judgment for $8,000. The prayer was for $7,200 only. A judgment for damages in excess of the amount prayed for is erroneous."

*Monterey Park Commercial & Savings Bank v. Bank of West Hollywood,* 125 Cal. App. 402, 13 P. (2d) 976.

"The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings."

*Meisner v. McIntosh,* 205 Cal. 11, 269 P. 612.

3. The Circuit Court of Appeals has failed to give effect to conditions precedent contained in the surety bond and failed to comply with the rule of *strictissimi juris* in the construction of the surety bond.

"Early in the history of California jurisprudence, the Supreme Court of the state indicated its adherence to the principle of strictissimi juris in constru-

ing contracts in the nature of suretyships. In Bensley v. Atwill, 12 Cal. 231, 239, 240, the court said:

'Courts do not make contracts for men. They are supposed to be able to make contracts for themselves; and we do not see, if a man chooses to bind himself to pay money on a particular event why he may not, also, as well give character to that event, and mark and describe it, and hold himself only bound by or after the event so defined; * * *' "

*Union Indemnity Co. v. Lang,* 71 F. (2d) 901.

4. The Circuit Court of Appeals has construed the subcontract referred to in the surety bond in favor of the party who drew the subcontract.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

*Civil Code of California,* Section 1654.

"It is a settled rule that in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument."

*Taylor v. J. B. Hill Co.* (1948), 31 A. C. 382.

5. The Circuit Court of Appeals has rendered judgment for interest prior to judgment on an unliquidated claim.

"Under the terms of the bond the surety agreed to 'save harmless the said Obligee (the respondent)

from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of said Principal (the building contractor) to be performed.' It was necessary, therefore, for the respondent to prove a loss before he would be entitled to recover on the bond; and it follows that, until the amount of that loss should be determined by the judgment of the court, the claim was uncertain and unliquidated."

*Perry v. Magneson,* 207 Cal. 617, 279 P. 650.

6. The premise of the decision of the Circuit Court of Appeals for the Ninth Circuit is based upon mistaken assumptions of fact without any support in the evidence.

"In approaching the question of fraud we bear in mind the rule that where both courts below have found a particular state of facts, we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence. Now, coming to consider the evidence in the light of this rule, we are constrained to the conclusion that the premise upon which the courts below acted, that is, the existence of a list of notes left by Tracy, is without any support in the evidence, and, indeed, rests but upon a mere mistaken assumption."

*Darlington v. Turner,* 202 U. S. 195, 220.

## IV.

### Questions Presented.

1. Has the Circuit Court of Appeals for the Ninth Circuit erroneously held that in this case there was no obligation on the part of Respondent to serve notice on Petitioner of any default of Duque and Frazzini until failure to supply needed material occurred?

2. Must the judgment of the Circuit Court be reversed because it is based upon findings of fact and conclusions of law which are wholly unsupported by the evidence?

3. Must the judgment of the Circuit Court of Appeals be reversed because it appears from the opinion of said court that the decision rests upon mistaken assumptions of fact entirely unsupported by the evidence?

4. Where it appears that the judgment of the Circuit Court is based upon the premise that an uncertainty exists in the provisions of a contract, must it be reversed because the court construed the contract in favor of the one who drew it?

5. Must the judgment of the Circuit Court of Appeals be reversed because it assessed interest prior to judgment on an unliquidated claim?

6. Must the judgment of the Circuit Court be reversed because it gave judgment in excess of the amount demanded in the complaint?

Wherefore, your Petitioner, Glens Falls Indemnity Company, a corporation, prays that this petition be

granted and that the aforesaid questions be determined by this Court upon the grant of a Writ of Certiorari to be issued and directed to the Circuit Court of Appeals for the Ninth Circuit.

Dated, Los Angeles, California, April 26 1948.

GLENS FALLS INDEMNITY COMPANY,
a corporation,
*Petitioner,*

By JOHN E. McCALL,
ALBERT LEE STEPHENS, JR.,
*Counsel for Petitioner.*

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**Certificate of Counsel.**

We, the undersigned, John E. McCall and Albert Lee Stephens, Jr., attorneys for Petitioner herein, hereby certify that in our judgment and opinion the foregoing petition for Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

JOHN E. McCALL,
ALBERT LEE STEPHENS, JR.

IN THE

# Supreme Court of the United States

October Term, 1947
No. .....

GLENS FALLS INDEMNITY COMPANY, a corporation,
*Petitioner,*

*vs.*

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. A., §347).

The judgment of the District Court was entered March 10, 1947 [R. 212-214].

The opinion of the Circuit Court of Appeals for the Ninth Circuit was rendered and filed February 3, 1948, and is reported in 165 Federal Reporter (2d) 649. The opinion is also printed in full in the record [R. 886-893].

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on February 3, 1948 [R. 894].

A timely petition for rehearing was denied March 3, 1948 [R. 895].

The Circuit Court of Appeals has in this case "decided an important question of local law in a way probably in conflict with applicable local decisions." (Supreme Court Rule 38(5)(b).)

## II.

## Statement of the Case.

This has already been stated in the preceding petition, in Paragraph I thereof, pages 1 to 4, entitled "SUMMARY STATEMENT OF MATTER INVOLVED", and is hereby adopted and made a part of this brief.

## III.

## Specification of Errors.

1. The Circuit Court of Appeals for the Ninth Circuit has erroneously held that in this case there was no obligation on the part of Respondent to serve notice on Petitioner of any default of Duque and Frazzini until failure to supply needed material occurred.

2. The Circuit Court of Appeals has erroneously based its decision and judgment upon findings of fact and conclusions of law which are wholly unsupported by the evidence.

3. The Circuit Court of Appeals has erroneously based its decision upon mistaken assumptions of fact entirely unsupported by the evidence.

4. The Circuit Court of Appeals has based its opinion and judgment upon the premise that an uncertainty exists in the provisions of a contract, but has erroneously construed the contract in favor of the one who drew it.

5. The Circuit Court of Appeals has erroneously assessed interest prior to judgment on an unliquidated claim.

6. The Circuit Court of Appeals has erroneously rendered judgment in excess of the amount demanded in the complaint.

## IV.

## Introductory.

This petition for writ of certiorari is predicated upon that part of Rule 38(5), Subdivision (b) which provides that jurisdiction may be taken "Where a Circuit Court of Appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions" and upon authority of *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487.

For the purposes of this argument, Petitioner has consolidated the questions hereinbefore specified under two main headings:

## V.

## ARGUMENT.

**First: The Circuit Court of Appeals for the Ninth Circuit Has Failed to Recognize and Follow the Law of the State of California, as Provided by Statute and as Enunciated by the Highest Court of that State Relating to the Doctrine of Strictissimi Juris or Strict Construction of Surety Contracts.**

The law of the State of California governs the interpretation of the contracts. The case was tried upon this primary principle [R. 299]. The law of California regarding the interpretation of surety contracts is set forth in the Civil Code of the State.

> "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."
>
> *Civil Code of California,* Section 1648.

> "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Except as provided in section 2794, the position of a surety to whom consideration moves is the same as that of one who is gratuitous."
>
> *Civil Code of California,* Section 2837.

California originally applied the rule of *strictissimi juris* in the interpretation of surety contracts:

> "Courts do not make contracts for men. The are supposed to be able to make contracts for themselves; and we do not see, if a man chooses to bind himself to pay money on a particular event, why he may not, also, as well give character to that event, and mark

and describe it, and hold himself only bound by or after the event so defined; * * *

Nor does it matter of what value this notice was to the defendant, or whether it was of any value. In a Court of law, effect is to be given to the bargain according to its terms, and Courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. The defendant bound himself only in a given way, and can be held only by the bargain he made, at least in the form of this action." *Bensley v. Atwill* (1859), 12 Cal. 231, 239, 240.

When some courts attempted to relax the rule as to compensated sureties, the legislature in 1939 amended Civil Code Section 2837 reaffirming the traditional rule.

The rule was recognized in the case of *Union Indemnity Company v. Lang, et al.* ( U. S. C. C. A., 9th—1934), 71 F. (2d) 901, 905. The court referred to the California Civil Code and said:

"The foregoing provisions seem to indicate that the rule of *strictissimi juris* is to be followed in California in the interpretation of conditions precedent in a contract of suretyship.

The decisions of the highest appellate courts of the state bear out this view. * * *

We believe that the decisions of the highest courts of California have recognized the principle of *strictissimi juris* in connection with notice of default, breach, or any act or omission that might cause a loss for which the surety might become liable, regardless of whether or not the surety has been in fact prejudiced by failure to receive such notice."

In the face of this rule and contrary thereto, the Circuit Court has brushed aside the unambiguous conditions precedent contained in the bond by saying, first, that the contracts involved (the subcontract and the surety contract) should be construed reasonably as a whole, and then, reasoning with the object of the contract in view, that production of material could be delayed until needed contrary to the provisions of the contract, without notice to the surety as provided in the conditions of the bond, without exoneration of the surety.

The Circuit Court said:

> *"We perceive no obligation on the part of appellee to serve notice on appellant of any default on the part of Duque & Frazzini until failure to supply needed material occurred."* (Italics ours.) [R. 890.]

This appears to be a statement of legal obligation concerned. It might be said, in other words, that the Court has concluded that it will not recognize any substantial breach of contract as a default, except a failure to supply materials as needed.

If any prior acts or failure to act on the part of the subcontractor are recognized, they would be failure to commence the production of materials on February 19 and the failure to produce the required amount of material and the failure to have adequate plant and equipment to do the job. All of such failures have existed from February 19, 1945. The complaint so alleges in paragraph X [R. 7].

If these failures were known to Respondent in February as will hereinafter appear, Respondent's letter of April 5 [R. 463-464] would either have to be a notice of February default, which comes too late to comply with the condi-

tions precedent in the bond, or it would show knowledge of default on the part of Respondent as of April 5, in which event Respondent's next letter of April 27 would be too late. In either choice, Petitioner should have prevailed. The Circuit Court has simply failed to follow the law of California which applies the rule of strict construction and exonerates a surety in the event of any failure to comply with conditions precedent in the bond.

In the case of *Schwab v. Bridge*, 27 Cal. App. 204, 206, 207, 149 Pac. 603, 604, the court said, in part:

> "While it is true that conditions precedent are not favored by the law, and are to be strictly construed against one seeking to avail himself of them (Antonelle v. Lumber Co., 140 Cal. 309-315, 73 Pac. 966), it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties. The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one. 2 Elliott on Contracts, Sec. 1580; Nat. Surety Co. v. Long, 125 Fed. 887."

The court, instead, has relaxed the *strictissimi juris* principle to the point of ignoring the words in the bond "in the event of *any* default" (italics ours) [R. 34] and has ignored the actual provisions of the contract by looking only to its general objective.

The subcontract was not a contract to sell materials. This was decided in *Basich Brothers Construction Co. v.*

*United States of America for the use of Turner, et al.* (U. S. C. C. A., 9th—1946), 159 F. (2d) 182, which decision concerned this subcontract. There are then, *other* material elements in the contract. Supplying materials was the general objective but, as a special guarantee of accomplishment, a contract was drawn which specified successive steps which, if followed, would necessarily result in the objective being attained. It was the performance of this contract which Petitioner underwrote, subject to the conditions of the bond.

The bond was made in the light of the protection which this contract afforded. Upon execution of the bond, the guarantees of performance contained in the contract ran to Petitioner, as well as to Respondent. To make sure that such guarantees of performance would not be overlooked and lost to Petitioner, certain conditions precedent were written into the bond. The conditions of the bond, which are important to this petition, are:

> (1) That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within twenty (20) days after the owner, or his representative, or the architect, if any, shall learn of such default;
>
> (2) that the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed;

and

(3) shall retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract [R. 34-35].

If Respondent chose for itself to overlook breaches of the contract amounting to default, it was free to do so. In fact, it had provided so in Article XVIII of the contract [R. 24]. It could overlook a default without waiving the right to later rely upon it. But when Respondent accepted the bond, it became duty bound to promptly notify Petitioner of *any* default, whether as to itself, Respondent chose to ignore the default or not. By failing to give notice promptly, disclosing the fact that production did not start on time and that the required plant and equipment had not been moved in, Respondent deprived Petitioner of the protection for which it had expressly contracted.

The materiality and substantiality of such defaults now clearly appear, for otherwise the contract would have been fully performed. By failing to give notice promptly, Respondent deprived Petitioner of a reasonable opportunity to remedy the failure of its Principal before the job had deteriorated into a situation from which an economical recovery was impossible. The Surety, Petitioner, is recognized in law by virtue of the condition precedent in the bond as having a right to notice of

any default in the performance provided for in the contract.

> "The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract and the question was not whether or not, although he failed to give the notice, he had exercised ordinary care to do so, but whether or not he had actually given the notice immediately upon the appearance of the known inability and failure of the contractor to perform his agreement." *National Surety Co. v. Long* (C. C. A., 8th Cir.—1903), 125 Fed. 887.

In the instant case Respondent's failure to give a required notice of facts within its knowledge has deprived Petitioner of the protection for which it contracted. Under such circumstances, the law of California is that the surety is exonerated. Respondent had no authority to exercise its own judgment as to what it conceived to be the importance of a breach at the time. Indeed, no such contention has ever been advanced. It was, however, argued by counsel for Respondent that failure to comply with these contract provisions constituted partial defaults only [R. 304-305]. Failure to comply with such basic provisions of the contract, which could so obviously lead directly to a failure to deliver materials, is a substantial breach and, therefore, a default requiring notice under the bond. Whether or not such a breach was inconveniencing Respondent at the time is entirely immaterial.

**Second: The Decision of the Circuit Court of Appeals for the Ninth Circuit Rests Upon Statements of That Court and Findings of Fact by the District Court Which Are Wholly Unsupported by the Evidence.**

"In approaching the question of fraud we bear in mind the rule that where both courts below have found a particular state of facts, we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence. Now, coming to consider the evidence in the light of this rule, we are constrained to the conclusion that the premise upon which the courts below acted, that is, the existence of a list of notes left by Tracy, is without any support in the evidence, and, indeed, rests but upon a mere mistaken assumption." *Darlington v. Turner* (1909), 202 U. S. 195, 220.

**A. The Judgment Is Unsustainable Because It Exceeds in Amount Both the Prayer of the Complaint and the Bill of Particulars and Erroneously Assesses Interest Prior to Judgment. This Illustrates a Lack of Attention to the Evidence, Accounts for Erroneous Findings and Explains the Errors of the Circuit Court.**

Quoting the opinion of the Circuit Court for the Ninth Circuit:

*"The principal amount was definite and fixed and consisted merely of charges for such items as labor, materials, etc., in excess of the amount earned by Duque & Frazzini. Complete records of these items were maintained and were at all times available to appellant, and the reasonableness of the charges incurred had never been disputed."* (Italics ours.) [R. 893.]

The error of this statement is obvious from the record. It was contended by Petitioner in the lower court that the damages were unliquidated in amount until judgment, and should, therefore, bear interest only from the date thereof. The record shows: The prayer in the complaint was for the total sum of $78,503.71 [R. 16]. The bill of particulars claims due the sum of $79,290.09 [R. 40]. Objections were filed by Petitioner [R. 125-127, 146-186]. Written admissions by Respondent show that $407.62 in excess of a sustainable amount had been included in the bill of particulars [R. 127-128]. One item of the bill of particulars concerned premiums on a public liability and property damage policy which was claimed to cover the subcontractor [R. 121]. Inspection of this policy was twice demanded in writing [R. 84-86, 225-227] and three times ordered produced by the court [R. 235, 248, 276-277]. When it was eventually produced, it appeared, and concededly so, that the subcontractor was expressly excluded from protection. Thus the bill of particulars should be reduced again by the additional amount of $476.26 [R. 316-317]. From this alone it clearly appears that all of the pertinent records of Respondent were not open to inspection.

In open court counsel for Respondent conceded contentions of Petitioner that six additional items totaling $472.36 he subtracted from the amount shown in the bill of particulars [R. 314-316]. Thereafter Respondent's witness testified to a further reduction in the amount claimed, in the sum of $21.00 [R. 345-346]. The total reduction thus demonstrated is $1,377.24.

The "principal amount" could not be said to be "definite and fixed," when Respondent was itself uncertain as to the amount and when proper reductions were conceded

only when Respondent was put upon proof and it was shown that the charges were unsustainable. There is no evidence to support the statement of the Circuit Court, but all of the evidence establishes the contrary proposition from which flows the contention of Petitioner that interest was improperly assessed. In the case of *Perry v. Magneson* (1929), 207 Cal. 617, 623, 279 Pac. 650, the court said:

> "As was said by this court in Cox v. McLaughlin, 76 Cal. 60, 67, 18 P. 100, 104 (9 Am. St. Rep. 164): 'The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are an uncertain quantity, depending upon no fixed standard, * * * and can never be made certain except by accord or verdict. As to such damages there can be no default, and hence the initial point at which to fix the starting of interest is wanting.' It follows, therefore, that respondent was not entitled to interest prior to the entry of judgment, and to that extent the judgment was erroneous."

Petitioner makes this further point: Subtract these amounts from the bill of particulars and the remainder only is established as the amount due, to wit: $77,912.85. Yet, the judgment is for $79,582.91,—$292.82 over the amount claimed in the bill of particulars and $1,079.20 (exclusive of interest, separately assessed) over the prayer in the complaint.

It is established law that no judgment in an action of this character may exceed the amount demanded. In the

case of *Meisner v. McIntosh* (1928), 205 Cal. 11, 269 Pac. 612, the court said:

> "Appellants contend that as the plaintiff alleged that he was damaged only in an amount of $1,000, it was error for the court to find, and upon such finding to award a judgment, in the sum of $1,525, or in any amount exceeding the sum of $1,000. In this we think appellants are right. The authorities overwhelmingly support appellants' contention. 'The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings.' 15 R. C. L. 604. 'A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint.'"

To the same effect see:

> *Brown v. Ball* (1932), 123 Cal. App. 758, 12 P. (2d) 28 (hearing denied by California Supreme Court July 29, 1932).

The judgment must, therefore, in any event, be set aside and made to conform to the pleadings as ordered in *Brought, et al. v. Cherokee Nation* (1904), 129 Fed. Rep. 192:

> "A judgment to this extent, and having such an effect, was not authorized by the pleadings, since a judgment in a legal proceeding for an amount greater than is claimed by the plaintiff in his complaint is erroneous, and will be reversed on appeal, although the judgment may be sustained by the evidence. Cauthorn v. Berry, 69 Mo. App. 404, 412; Moore v. Dixon, 50 Mo. 424; Wright v. Jacobs, 61 Mo. 19; Armstrong v. City of St. Louis, 3 Mo. App. 100, 106; Corning v. Corning, 6 N. Y. 97, 105."

See also *Williamson v. Chicago Mill & Lumber Corporation* (1932), 59 F. (2d) 918, wherein the court stated the general rule:

> "However, the 'supplemental complaint' stated the damage sought to be recovered for this cutting to be $8,000 and the record shows no attempt to amend this amount to conform to the proof. The amount stated in the pleading measures the maximum possible recovery."

**B. The Decision of the Circuit Court of Appeals for the Ninth Circuit Entirely Depends Upon the Following Statements Which Are Wholly Unsupported by the Evidence.**

1. Quoting from the opinion of the Circuit Court:

*"Appellee had no knowledge of a default until the material began to run short in April."* (Italics ours.) [R. 890-891.]

The contract contained provisions designed to guarantee performance in the time specified. It specified the starting date and the size of the plant which, if operated each day on full production, was hardly capable of producing more than the required quantities, as can be demonstrated from the record by a simple mathematical computation. Any delay in getting started or in failing to bring in the specified plant and equipment would, therefore, be a substantial breach and undeniably a default, especially when time is made of the essence, and time was made of the essence in the subcontract [R. 31].

The evidence establishes that both the general superintendent and the president of respondent corporation knew in February (page 29 of this brief) that pro-

duction of materials did not start on time and that specified plant and equipment had not been moved in.

Shortage of materials in April was not the first default. The Circuit Court's misperception as to the legal obligation to give notice is discussed in this brief, pages 16 to 20, as a matter concerning applicable California law. The importance of this quotation from the opinion is that there was no communication between Respondent and Petitioner, whether sufficient to constitute notice of default or not, relating to the subcontract prior to April 5, 1945, and, therefore, the condition precedent in the bond requiring prompt notice of default was not met, and the surety should be exonerated.

2. *"The contract does not specify the nature of the work that was to commence on February 19."* (Italics ours.) [R. 890.]

This is important in relation to Article II of the contract. Any doubt as to its meaning is quickly clarified by reading the entire contract and the letter dated April 5, 1945 from Respondent to the subcontractor [R. 463-464]. Article II reads as follows:

> "The work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945." [R. 19.]

If the word "work" in this Article means the production of materials, which is the sole purpose, end and objective of the contract, there can be no question but that on February 19th the subcontractor was in default, and, as pointed out hereafter (page 29) of this brief).

Respondent knew it in February. As a consequence, a notice to the surety as early as April 5, 1945, would not have been a prompt notice, or even within the twenty day limitation, and the surety would thereby be exonerated.

The contract is the best evidence of what it contains. While Article II [R. 19] is not explicit as to the connotation of the word "work," it is clear and inescapable, if the rest of the contract is read. For example (and there are many others), Article III [R. 19] provides that changes made by the Principal (the Government) in the original contract in the amount of said "work" shall bind the subcontractor. Article IV [R. 19] provides that the contractor (Respondent) shall be held harmless by the subcontractor from liability for "damage to the said work." Article XVI [R. 23] provides for "partial payments for work performed under" the subcontract, and Article XVII [R. 23-24] provides for "full payment for his work according to the computations of the Principal's engineer." Payments to the subcontractor were only made for material produced and delivered. Even in the questioned Article II, the true meaning of the word "work" appears. Of course, it is the production of materials that must be completed on or before June 3, 1945.

If affirmation is needed, it may be found in Respondent's letter to the subcontractor dated April 5, 1945:

> "Reference is made to our Contract Agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945." [R. 463-464.]

There is no evidence to support the court's statement that the contract does not specify the nature of the work which was to commence February 19th. As a matter of law, if uncertainty exists it should be construed against the Respondent who drew it.

> "It is a settled rule that in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument." *Taylor v. J. B. Hill Co.* (1948), 31 A. C. 382.

**C. The Findings of the District Court Contain Many Statements of Fact Which Find No Support Whatsoever in the Evidence.**

Chief among these is the statement in Finding X referring to the letter from Respondent to the subcontractor (Duque & Frazzini) dated April 5, 1945 [R. 463-464], a carbon copy of which went to petitioner surety, to wit:

> "That the notice given to said defendant, Glens Falls, as aforesaid, constituted notice to said defendant as required by the terms of said Subcontract Bond." [R. 198.]

This finding is a patent error and a logical inconsistency. If, as the District Court found, the letter constitutes the notice of a default, it would be notice of a default on February 19, 1945. The only complaint which might be attributed to its plain words is that production was not commenced on time, as agreed, and that the quantities agreed to be produced have not been so produced. The remainder of the letter consists of a demand to move in additional equipment, which demand calls for future performance.

In the light of the established fact that both the general superintendent [R. 627] and the president of respondent corporation [R. 596-597] knew that production of materials did not start February 19th, the judgment of the District Court is not supported by this finding but, conversely, is thereby impeached.

Respondent's president testified that he knew such fact of his own knowledge [R. 596-597]. This appears to be a clear statement that he did not acquire his knowledge from others and must, therefore, have known the fact prior to the time production actually started. The general superintendent testified that on February 11th, and every day thereafter during February, he was in the pit where the subcontractor was working [R. 627] and that he was supervising the production of materials [R. 625].

Respondent's operations at the pit started at a later date [R. 771-772], and the subcontractor alone was producing materials from the pit and there is no evidence to the contrary. The general superintendent also testified that he had a book wherein he kept a record of the progress of the job and that he therein noted the first day that production by the subcontractor started [R. 621-622]. It is not possible to believe that he was at the time ignorant that the subcontractor had not started production.

The court's finding is not in conformity with the complaint or the proof. Respondent has never contended that the letter of April 5, 1945 is a notice of default or was intended as such.

Finding V [R. 196] finds no support in the evidence, and is a mixed conclusion of law and fact, and contrary to the established law.

> "* * * the contention that a surety on such a bond becomes a party to the original contract between the principal and the obligee in the bond and assumes all obligations of that contract, regardless of the conditions, provisions, and limitations contained in the bond or indemnity contract, finds no support in reason or authority. The contract of the defendant in error was one of indemnity only, and the obligation it assumed must be measured by the terms of the indemnity contract to which it was a party, not by the terms of some other contract to which it was not a party." *Pacific Automatic Device Co. v. United States Fidelity and Guarantee Co.*, 15 F. (2d) 164, 165 (C. C. A., 9th Cir.—1926).

A cursory reading of Findings VII [R. 197] and XIII [R. 199-200] shows that said findings are to the effect that Respondent has fully complied with conditions precedent in the bond. From what has been said hereinbefore in this brief, it will appear that said findings find no support in the evidence.

**Conclusion.**

It is respectfully submitted that the present case is clearly one calling for the exercise of the power of this Honorable Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Dated, Los Angeles, California, April 26, 1948.

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